IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DANIELLE BUCKALEW	:	**CIVIL ACTION**
	:	
v.	:	
	:	
EBI COMPANIES and ORION CAPITAL	:	**NO. 01-3232**

M E M O R A N D U M

WALDMAN, J. **June 5, 2002**

Plaintiff has asserted parallel claims under the Americans with Disabilities Act ("ADA") and the Pennsylvania Human Relations Act ("PHRA"). She alleges that defendants failed to accommodate her disability and retaliated against her for seeking accommodation.[1] Presently before the court is defendants' Motion to Dismiss plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6) as time barred.

Dismissal is appropriate when it clearly appears that plaintiff can prove no set of facts in support of a claim which would entitle her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d

[1] In the original complaint, plaintiff named EBI Companies as the only defendant. On October 17, 2001 plaintiff filed an amended complaint naming both EBI Companies and Orion Capital as defendants. Plaintiff alleged that Orion was EBI's parent. It appears that EBI Companies is actually a trade name used by Orion. It may be noted that if EBI were a distinct entity, plaintiff has alleged no facts to establish a claim for parental corporate liability. Thus, although the court will refer to defendants in the plural consistent with the caption and allegation that "Plaintiff was employed by Defendants," it appears Orion is the sole defendant in interest.

Cir. 1984). Such a motion tests the legal sufficiency of a claim while accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987); Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A court may also consider matters of public record. See Churchill v. Star Enter., 183 F.3d 184, 190 n.5 (3d Cir. 1999); Beverly Enter., Inc. v. Trump, 182 F.3d 183, 190 n.3 (3d Cir. 1999), cert. denied, 120 S. Ct. 795 (2000). In assessing a motion to dismiss, however, a court is not required to credit bald assertions or legal conclusions contained in the complaint. See General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993); In re CD Now Inc. Securities Litigation, 138 F. Supp. 2d 624, 632 (E.D. Pa. 2001). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

A claim may be dismissed as time-barred where it is clear from the complaint that the applicable statute of limitations has lapsed. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994); Cito v. Bridgewater Township Police Dep't, 892 F.2d 23, 25 (3d Cir.

1989); Elliott, Reihner, Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund, 161 F. Supp. 2d 413, 420 (E.D. Pa. 2001); Jaramillo v. Experion Info. Solutions, Inc., 155 F. Supp. 2d 356, 358 (E.D. Pa. 2001); Arizmendi v. Lawson, 914 F. Supp. 1157, 1160 (E.D. Pa. 1996).

The pertinent facts as alleged by plaintiffs are as follow.

Plaintiff was employed in defendants' workers compensation underwriting business as a data entry specialist from May 1, 1995 to February 12, 1999. In May 1998, plaintiff began wearing a wrist brace at work. Her supervisor, Kathy Tennett, observed this and set up an appointment for plaintiff with Dr. Scott Kozin, defendants' workers compensation doctor, who diagnosed plaintiff with tendinitis and referred her to physical therapy. The physical therapists examined plaintiff's work station and sent a letter to Maria Murray, the branch manager, recommending changes to alleviate her condition. Defendants installed a desk extension and curved style keyboard. The extension, however, was installed without measuring plaintiff's height and exacerbated her pain. Defendants failed to install a wrist rest, sliding keyboard tray, and a chair with adjustable height and armrests as the therapists had also recommended.

Ms. Tennett and Kelly Romaniello of the human resources department advised plaintiff that a new chair would be ordered but it was not. In early October 1998, the pain in plaintiff's wrists became worse, and she asked Ms. Tennett to order the wrist rest. Ms. Tennett approached Gerald Poppke, the loss prevention supervisor, to order the wrist rest. Mr. Poppke provided a piece of mouse pad rather than order a proper wrist rest.

On October 29, 1998, plaintiff saw Dr. Kozin who gave her a left wrist injection. Because of the pain in her wrists, plaintiff stopped working on November 7, 1998. June Breit, a caseworker, directed plaintiff to return to work on November 24, 1998. Upon her return plaintiff was in pain and remained out of work until she was again directed to return on January 26, 1999. After examining plaintiff and speaking with her therapist on January 25, 1999, Dr. Kozin had concluded she could return to work. Margery Lockhart, plaintiff's physical therapist, had prepared a report recommending plaintiff work for four hours each day for two weeks, followed by two weeks at six hours per day and then full-time.

Plaintiff was placed in a new work area upon returning. Her desk was higher and her bins were placed on top of a filing cabinet. Plaintiff thus had to reach more than she had before. She complained to Janice Moore, plaintiff's manager, Ms. Tennett

and Ms. Romaniello, but was not returned to her previous work station.

The following day, plaintiff complained to Ms. Romaniello that she was in a lot of pain. Ms. Romaniello told plaintiff that she should go home and make an appointment with Dr. Kozin. On February 4, 1999, a physical therapist examined plaintiff's work station and ordered a new keyboard tray for her desk. On February 5, 1999, plaintiff met with Dr. Kozin who wrote a note permitting her to type and indicating that she should return to her old workstation. She did so on February 8, 1999 but was unsatisfied. The file cabinet was too high, the chair was too big for her body and she had to reach to type because the armrests prevented the chair from being pulled in. Plaintiff never received a sliding keyboard tray. On February 12, 1999 plaintiff complained to Ms. Tennett and Ms. Moore of unbearable pain. Ms. Tennett told plaintiff that she should see her own doctor.

Shirley Plummer, a friend of plaintiff, called an orthopedist, Dr. Thomas Mackell, to make an appointment for her on February 15, 1999. After examining plaintiff, Dr. Mackell concluded that she did not have tendinitis and referred her to a neurologist, Dr. William Wiggins. Plaintiff was examined on February 23, 1999 by Dr. Wiggins to whom it appeared she had carpal tunnel syndrome. After further testing on March 4, 1999,

Dr. William Wiggins diagnosed plaintiff with reflex sympathetic dystrophy. Plaintiff has not worked since. She has visited "countless" doctors and therapists to address her condition.

The ADA incorporates the remedies and procedures in Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 12117(a). To maintain a suit against an employer under the ADA, a plaintiff "must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and receive a right to sue letter." Reddinger v. Hospital Central Services, Inc., 4 F. Supp. 2d 405, 409 (E.D. Pa. 1998). In a deferral or work-sharing state such as Pennsylvania, the plaintiff has 300 days from the date of the alleged discrimination in which to file an administrative charge. See Oshiver, 38 F.3d at 1385. To maintain a claim under the PHRA, a plaintiff must first have filed an administrative complaint with the Pennsylvania Human Relations Commission within 180 days of the alleged act of discrimination. See 43 Pa. C.S.A. § 959(g); Woodson v. Scott Paper Co., 109 F.3d 913, 925 (3d Cir.), cert. denied, 522 U.S. 914 (1997); Vincent v. Fuller, 616 A.2d 969, 971 (Pa. 1992).

It is clear from her complaint that plaintiff first filed an administrative complaint more than fifteen months after the last alleged act of discrimination, well beyond the respective time limits. In the complaint, plaintiff asserts that her claims "are nonetheless timely due to the doctrine of

equitable tolling." Plaintiff does not further elaborate and now contends that merely invoking the doctrine is sufficient to survive a motion to dismiss. It is not. The doctrine is not a talisman or mantra merely to be recited. A plaintiff must allege facts which, taken as true, are sufficient to show the doctrine may be applicable. See Oshiver, 38 F.3d at 1391-92.

Plaintiff alternatively seeks leave to amend to allege facts to show the applicability of the doctrine. The pertinent facts set forth in the proposed amendment are as follow.

Plaintiff engaged an attorney to pursue a workers compensation claim in the spring of 1999. He continued to represent her through mid-2000. At a meeting on May 5, 1999, plaintiff sought her attorney's advice about asserting a claim against defendants for failure to accommodate her condition by providing a new work station. He advised her that she did not have a viable failure to accommodate claim which advice she characterizes as "negligent." Plaintiff's condition became progressively worse. She was in severe pain "as a result of advanced carpal tunnel syndrome and regional complex pain syndrome." She was unable to drive an automobile when "her upper left quadrant was rendered immobile" and unable to place telephone calls with a system of typing she had utilized because

of her hearing loss.[2] Plaintiff concludes that because of the negligent advice of her prior attorney and her physical condition she "was effectively prevented from consulting with other counsel and from timely asserting her legal rights."

Leave to amend is generally granted absent undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility. See Foman v. Davis, 371 U.S. 178, 182 (1962); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997); Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988); Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984); Windsor Card Shops v. Hallmark Cards, 957 F. Supp. 562, 571 (D.N.J. 1997). Leave to amend is properly denied for futility where the proposed claim would be barred by an applicable statute of limitations. See Mackensworth v. S.S. American Merchant, 28 F.3d 246, 251 (2d Cir. 1994); Jablonski, 863 F.2d at 292; Marx v. Centran Corp., 747 F.2d 1536, 1551 (6th Cir. 1984); Glaziers and Glass Workers Union Local No. 252 Annuity Fund v. Janney Montgomery Scott, Inc., 155 F.R.D. 97, 100-01 (E.D. Pa. 1994).

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[2] The latter allegation does not appear in plaintiff's proposed amendment but rather is stated in her brief. The court will assume that this could be properly alleged and will consider the statement as if it were. Plaintiff does not claim that defendants failed to accommodate her hearing impairment which predates her employment with them.

The time limitations for filing a complaint are analogous to a statute of limitations and thus subject to equitable tolling. See Oshiver, 38 F.3d at 1387. These requirements, however, have been established by Congress and are "not to be disregarded by courts out of a vague sympathy for particular litigants." Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984). "[I]n the absence of a recognized equitable consideration, the court cannot extend the limitations period by even one day." Mosel v. Hills Dep't Store, Inc., 789 F.2d 251, 253 (3d Cir. 1986) (citations omitted). Equitable tolling is "a remedy available only sparingly and in extraordinary situations." Robinson v. Dalton, 107 F.3d 1018, 1023 (3d Cir. 1997).

Equitable tolling may be appropriate where the defendant has actively misled the plaintiff regarding her cause of action, where the plaintiff has in some extraordinary way been prevented from asserting her rights or where she has mistakenly asserted her rights in the wrong forum. See Lake v. Arnold, 232 F.3d 360, 370 n.9 (3d Cir. 2000); Oshiver, 38 F.3d at 1387. A plaintiff seeking to equitably toll a statute of limitations must also show that she exercised reasonable diligence in pursuing her claim. See New Castle County v. Halliburtun NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997); Scary v. Philadelphia Gas Works, 202 F.R.D. 148, 153 (E.D. Pa. 2001). The burden is on a plaintiff to

justify equitable tolling. See Boos v. Runyon, 201 F.3d 178, 185 (2d Cir. 2000); Byers v. Follmer Trucking Co., 763 F.2d 599, 600-01 (3d Cir. 1985). Plaintiff contends that due to her attorney's negligence and her physical condition she "was prevented from timely asserting her rights in an extraordinary way."

Carpal tunnel syndrome or a similar condition resulting in limitation of repetitive motion is not a disability under the ADA unless it substantially limits one's ability to perform a wide range of jobs or other major life activity. See Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54, 60 (1st Cir. 2001); Price v. Marathon Cheese Corp., 119 F.3d 330, 336 (5th Cir. 1997); Helfter v. United Parcel Service, Inc., 115 F.3d 613, 617-18 (8th Cir. 1997); McKay v. Toyota Motor Mfg. USA, Inc., 110 F.3d 369, 373 (6th Cir. 1997). Whether a particular person is disabled, however, necessarily requires an individualized assessment. See Sutton v. United Airlines, Inc., 527 U.S. 471, 482 (1999).

One may reasonably infer from plaintiff's proffered allegations that counsel's assessment of the viability of an ADA claim was cursory and may have been erroneous which, for purposes of the instant motion, the court will assume to be so. Nevertheless, attorney error or negligence does not warrant equitable tolling. See Smaldone v. Senkowski, 273 F.3d 133, 138 (2d Cir. 2001); Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001);

South v. Saab Cars USA, 28 F.3d 9, 12 (2d Cir. 1994); Reifinger v. Nuclear Research Corp., 1992 WL 368347, *2 (E.D. Pa. 1992). Equitable tolling may be justified in extreme cases of attorney misbehavior such as outright abandonment of a client after undertaking representation or affirmatively misrepresenting to the client that a case is being prosecuted when it is not. See Seitzinger v. Reading Hosp. and Medical Center, 165 F.3d 236, 240-41 (3d Cir. 1999). Plaintiff, however, has identified no reported opinion in which a court found that a limitations period could be tolled from the time an attorney erroneously advised a plaintiff she did not have a good claim until she found an attorney who advised her that she did.[3] An attorney's failure adequately to assess the merits of a putative claim is garden variety negligence and does not deter a diligent plaintiff from seeking a second opinion.[4]

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[3] There is recourse for a loss proximately caused by erroneous advice of an attorney given negligently, in disregard of settled principles of law or without undertaking a measure of research sufficient to allow the recipient to make an informed decision. It is a malpractice action. See, e.g., McMahon v. Shea, 657 A.2d 938, 940 (Pa. Super. 1995); Collas v. Garnick, 624 A.2d 117, 120-21 (Pa. Super. 1993).

[4] Plaintiff was not ignorant of the substance and procedures of the ADA and PHRA. She had filed an administrative charge and lawsuit against her previous employer under these statutes for, inter alia, failure to accommodate another disability and retaliating against her for requesting such accommodation. See Buckalew v. American Travellers Corp., E.D. Pa., Civ. No. 97-2996.

Plaintiff contends that her physical condition, however, prevented her from consulting with other counsel and timely asserting her claims. The court does not mean to minimize the pain and limitations plaintiff avers she was experiencing. Plaintiff herself, however, acknowledges that during the limitations period she made "countless" visits to doctors and pursued a workers compensation claim. One cannot reasonably find from plaintiff's proffered allegations that she was incapable of also consulting with other counsel during this period. Indeed, plaintiff did secure counsel who filed an administrative complaint on May 19, 2000 during the period she alleges she was in severe pain and partially immobilized.

The court cannot conscientiously conclude that the factual allegations proffered by plaintiff satisfy the stringent standards for equitable tolling. Defendants' motion will thus be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of June, 2002, upon consideration of defendant's Motion to Dismiss (Doc. #7) and plaintiffs' response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and the above action is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.